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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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11 AM GENERAL LLC.

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14 ACTIVISION BLIZZARD, INC.;
15 ACTIVISION PUBLISHING, INC.,
MAJOR LEAGUE GAMING CORP.

16 | Defendants.

Misc Case No. 2:18-mc-157

S.D.N.Y. Case No. 1:17-cv-8644

**NOTICE OF MOTION AND JOINT
STIPULATION RE MOTION TO
COMPEL COMPLIANCE WITH
THIRD PARTY SUBPOENAS TO
GLOBAL ICONS, LLC**

DATE: December 3, 2018

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Mitchell
Silberberg &
Knupp LLP

B502189.1

1 **TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF**
2 **RECORD HEREIN:**

3 **PLEASE TAKE NOTICE** that on December 3, 2018, at tbd .m.
4 in Courtroom tbd of the United States District Court, Defendants Activision
5 Blizzard, Inc., Activision Publishing, Inc., and Major League Gaming Corp.
6 (collectively, “Activision”) will, and hereby does, move this Court for an order
7 compelling third party Global Icons, LLC (“Global”) to comply with two
8 subpoenas (one for documents and one for testimony) issued by Activision
9 Publishing, Inc. (“Activision”) in the above-entitled action currently pending in the
10 U.S. District Court for the Southern District of New York (the “Action”).

11 Specifically, by this Motion Activision requests that the Court order that
12 Global Icons (1) comply with electronic discovery obligations, and (2) make a
13 representative for deposition.

14 This motion is based upon this Notice of Motion; the concurrently-filed Joint
15 Stipulation; and such further evidence and arguments as may be presented at or
16 before any hearing on the motion.

17

18 DATED: November 7, 2018

19 MARC E. MAYER
20 MITCHELL SILBERBERG & KNUPP LLP

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22 By: /s/ Marc E. Mayer
23 Marc E. Mayer
24 Attorneys for Defendants

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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

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14 AM GENERAL LLC,
15 Plaintiff,

16 v.

17 ACTIVISION BLIZZARD, INC.;
18 ACTIVISION PUBLISHING, INC.,
19 MAJOR LEAGUE GAMING CORP.,

20 Defendants.

21 Misc Case No. 2:18-mc-157
22 S.D.N.Y. Case No. 17 Civ. 8644

23 **JOINT STIPULATION RE
24 MOTION TO COMPEL
25 COMPLIANCE WITH THIRD
26 PARTY SUBPOENAS TO
27 GLOBAL ICONS, LLC**

INTRODUCTORY STATEMENTS

Activision's Introductory Statement

3 This Motion to Compel is necessitated by the longstanding and inexcusable
4 failure of Global Icons LLC (“Global Icons”) to comply with two subpoenas (one
5 for documents and one for testimony) issued by Activision Publishing, Inc.
6 (“Activision”) in the above-entitled action currently pending in the U.S. District
7 Court for the Southern District of New York (the “Action”). For more than three
8 months, Activision has attempted to work with Global Icons to obtain all of its
9 responsive documents and a witness to provide testimony. Global Icons has not
10 only refused to provide deposition dates or a specific date by which it would
11 complete its document production, but now has almost completely refused to
12 respond to Activision’s repeated emails.

In the underlying action, Plaintiff AM General, the alleged owner of trademark and trade dress rights in the “Humvee” military vehicle, claims that Activision infringed its rights by including depictions of the Humvee vehicle in certain of its *Call of Duty* video games released between 2007 and 2013. AM General claims that as a result of Activision’s use, members of the public are likely to be confused or misled into believing that AM General sponsored, endorsed, or approved the *Call of Duty* video games at issue. As damages, AM General is seeking the reasonable value of a license for the allegedly infringing use. Among Activision’s defenses to AM General’s claims is that the use of the “Humvee” trademark and trade dress is protected by the First Amendment as articulated in cases such as *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); *E.S.S. Entertainment 2000 v. Rock Star Videos*, 547 F.3d 1095 (9th Cir. 2008); *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013); and *Novalogic v. Activision Blizzard, Inc.*, 41 F. Supp. 3d 885 (N.D. Cal. 2013). Activision also has argued that the extensive unlicensed use of the Humvee in popular media makes it unlikely that members of the public will be confused or misled by the use.

1 Since at least 2003, Global Icons has acted as the *exclusive* “worldwide
 2 licensing representative” for AM General in connection with the licensing of the
 3 Humvee trademark and trade dress. As licensing representative, Global Icons was
 4 tasked with monitoring for potential infringements, locating and identifying
 5 potential licensees, collecting royalties, and coordinating licensing activity. Global
 6 Icons has a direct financial interest in Humvee licenses; its compensation is
 7 directly tied to the licenses it procured for AM General. Thus, Global Icons is not
 8 an uninterested or tangential third party; it stands in the shoes of AM General with
 9 respect to all licensing and enforcement activity.

10 During its 15 years as licensing representative, Global Icons extensively
 11 monitored the marketplace for the unauthorized use of the Humvee, including in
 12 audiovisual works, such as video games, motion pictures, and television programs.
 13 It sent a few demand letters to video game developers and publishers. It also
 14 apparently negotiated (or attempted to negotiate) dozens of license agreements. As
 15 a result, Global Icons has unique knowledge about a variety of issues directly
 16 related to this action, such as AM General’s policies and priorities concerning the
 17 unauthorized use of Humvees in audiovisual works; its knowledge of the *Call of*
 18 *Duty* games and apparent decision not to take action on them until 2017 (between
 19 four and ten years after the fact); the reasonable value of a license for the allegedly
 20 infringing use; and communications with other video game companies on
 21 trademark issues.

22 On **May 25, 2018**, Activision served a subpoena on Global Icons, seeking
 23 several categories of documents broadly related to its licensing activities for AM
 24 General. This was followed by both informal requests for a deposition and a
 25 formal deposition subpoena. For more than *five months*, Global Icons has delayed
 26 and stonewalled, apparently hoping to run down the clock. The discovery cut-off
 27 in this case is **December 7, 2018**. Yet as of today, despite dozens of email and
 28 letter requests, Activision still does not have (1) proposed dates for a deposition, or

1 (2) a commitment to conduct electronic discovery. In the meantime, Global Icons
 2 continues to ignore Activision's emails and letters. Because it has become
 3 apparent that without a court order Global Icons will continue to drag its feet,
 4 Activision has brought this Motion.

5 Accordingly, the Court should order that (1) Global Icons immediately
 6 produce all responsive electronic documents generated by Activision's proposed
 7 search terms, and (2) make a witness available for deposition between seven and
 8 ten days after that supplemental production.

9 **Global Icons' Introductory Statement**

10 Global Icons LLC ("Global Icons") is a third party to a litigation between
 11 trademark owner AM General LLC and video game publisher Activision
 12 Publishing, Inc. ("Activision"). Global Icons does not dispute Activision's rights
 13 to documents and testimony pursuant to the subpoenas served on Global Icons, and
 14 has produced all documents that were subject to the parties' agreement. However,
 15 Global Icons cannot adequately respond to this motion because, as explained to
 16 Activision, counsel for Global Icons has just transitioned from DLA Piper (US) to
 17 Venable LLP. At the time of this filing, DLA has not transferred Global Icons'
 18 electronic or paper files and thus counsel lacks access to its communications with
 19 Activision, and the documents that have already been produced. Until Global
 20 Icons' representation and files are transferred, including the electronic database
 21 storing Global Icons' files and documents, Global Icons is unable to substantively
 22 respond to this motion or further produce documents. Similarly, the deposition of
 23 Global Icons' representative, Mike Gard, cannot take place until Global Icons'
 24 representation and files have been transferred. This process is expected to be
 25 completed no later than week on November 12, 2018.

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ISSUES IN DISPUTE

I. ISSUE 1: GLOBAL ICONS' FAILURE TO COMPLY WITH ELECTRONIC DISCOVERY OBLIGATIONS.

A. Activision's Statement

5 It is well-established, including under the plain language of Fed. R. Civ. P.
6 45, that third parties are subject to the same electronic discovery obligations as are
7 parties to the lawsuit. *See Advisory Committee Notes to Rule 45 (2006)* (“Rule 45
8 is amended to conform the provisions for subpoenas to changes in other discovery
9 rules, largely related to discovery of electronically stored information.”) *See also*
10 *Premier Election Sols., Inc. v. Systest Labs Inc.*, No. 09-CV-01822, 2009 WL
11 3075597, at *5 (D. Colo. Sept. 22, 2009) (non-party status does not relieve
12 nonparty of obligations to respond and comply with proper discovery requests);
13 *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 34 F. Supp. 2d 47, 50 (D.D.C.
14 1998) (stating that parties and nonparties are equally required to comply with
15 discovery obligations outlined in Federal Rules of Civil Procedure). Nevertheless,
16 Global Icons has consistently failed to conduct *any* searches of electronic
17 documents. Instead, the entirety of its production has consisted of PDF copies of
18 paper documents.

19 In an effort to reach agreement on this issue, Activision has made a very
20 modest e-discovery proposal. Activision's proposal requested that Global Icons
21 conduct a search of only four custodians, using a very limited range of keywords:

22 • (“AM General” OR Humvee* OR HMMWV* OR Hummer*) **AND**
23 (videogame* OR “video game*” OR movie* OR “motion picture” OR film* OR
24 “First Amendment” OR “Xbox” OR “Playstation”)
25 • “Call of Duty” OR “Activision” OR “Modern Warfare” OR “MW2”
26 OR “MW3” OR “Black Ops”
27 • (“AM General” OR Humvee* OR HMMWV* OR Hummer*) **AND**
28 (“THQ” OR “Codemasters” OR “Infogrames” OR “Take 2” OR “Take2” OR

1 “Take Two” OR “Take-Two” OR “Rockstar” OR “EA” OR “Electronic Arts” OR
 2 “Novalogic” OR “Homefront” OR “GTA V” OR “Grand Theft Auto” OR
 3 “Battlefield” OR “SOCOM*” OR “ArmA” OR “Squad” OR “Operation
 4 Flashpoint”)

5 These keywords are designed to capture any correspondence or discussions
 6 concerning either (1) the use of the Humvee in video games or other audiovisual
 7 works, or (2) the Activision video games at issue. Specifically, the keywords
 8 should enable Global Icons to collect and produce any discussion about whether to
 9 approve or not approve the use of the Humvee in video games, whether AM
 10 General had any right to prevent filmmakers and game developers from depicting
 11 the Humvee, how much to charge for such uses, and whether AM General and
 12 Global Icons were aware of the *Call of Duty* games at the time they were released
 13 to the public.

14 Global Icons has not claimed that the requested electronic discovery is
 15 unduly burdensome. Nor can it. Accordingly, Global Icons should be ordered to
 16 comply with its electronic discovery obligations – and, specifically, to run the
 17 keywords on the emails of the four custodians – within ten days. Global Icons also
 18 should be ordered to provide a privilege log for any documents that it has withheld
 19 or intends to withhold on the grounds of attorney-client privilege or attorney work-
 20 product.

21 **B. Global Icons’ Statement**

22 First, Activision has not complied with the procedural requirements of Local
 23 Rule 37-1 and 45 in that the moving party must make efforts to participate in an in-
 24 person conference of counsel prior to filing a joint stipulation. Activision made no
 25 such request and no in-person conference of counsel took place prior to
 26 Activision’s service of its portion of this joint stipulation. Second, as explained
 27 above, Global Icons is presently unable to substantively respond to this motion, or
 28 produce further documents, until its electronic files and databases are transferred to

1 new counsel. That process should be completed no later than the week of
 2 November 12, 2018, thus mooted Activision's motion.

3 **II. ISSUE 2: GLOBAL ICONS' FAILURE TO MAKE A WITNESS
 4 AVAILABLE FOR DEPOSITION.**

5 **A. Activision's Statement**

6 There is no dispute that Global Icons' representatives, including its CEO
 7 Mike Gard and its attorney Christine Sovich, possess unique knowledge that is
 8 highly relevant to this dispute. At the core of this dispute is whether Global Icons
 9 had the right to control the use of the Humvee in audiovisual works, and if so, what
 10 the value of a license would be for the alleged use. Global Icons was AM
 11 General's *exclusive licensing agent*. Global Icons' representatives exchanged
 12 letters and emails with third party infringers and discussed infringement claims
 13 with them. They negotiated the terms of licenses for the use of AM General's
 14 purported trademarks and trade dress. They communicated with third parties about
 15 how AM General's trademarks and trade dress may be used by third parties. They
 16 made decisions about when to enforce AM General's purported trademarks rights
 17 and when not to do so (for example, when used in movies, books, and video
 18 games). They presumably prepared business plans and proposals concerning
 19 licensing strategies.

20 Activision first requested that Global Icons provide dates for its witnesses in
 21 a letter dated ***July 18, 2018***. After two weeks of prodding by Activision, on
 22 August 1, 2018, Global Icons agreed to provide deposition dates, but claimed that
 23 because of its counsel's busy trial schedule the deposition could not take place
 24 until after the month of August 2018. Unfortunately, Global Icons never provided
 25 **any** proposed dates, either for a September deposition or later.

26 On September 27, Activision requested a meet-and-confer with Global Icons
 27 to discuss this issue, along with other issues. Global Icons never responded. Thus,
 28 on October 3, 2018, Activision served a second subpoena on Global Icons for the

1 deposition of a Global Icons representative. The deposition was set for
 2 October 19, 2018. ***Global Icons did not respond to the subpoena and did not***
 3 ***appear for the deposition.*** Nor did it serve any objections or offer alternative
 4 dates. As a result, Global Icons is now in direct violation of the subpoena.

5 Global Icons has no basis for its refusal to appear for the deposition or, at
 6 minimum, provide alternative dates. Indeed, Activision has been extremely
 7 accommodating, both to Global Icons and its counsel. Because the discovery cut-
 8 off is fast-approaching, Activision simply cannot wait any longer. Accordingly,
 9 the Court now must order Global Icons to appear for deposition within 14 days of
 10 its production of the electronic documents set forth above.

11 **B. Global Icons' Statement**

12 Global Icons intends to produce its representative, Mike Gard, for deposition
 13 in this matter. However, as explained above, the deposition cannot be set until
 14 Global Icons' representation and files are transferred to the Venable because,
 15 among other things, Mr. Gard is unable to review the applicable documents to
 16 prepare for his deposition. As stated, Global Icons expects the transfer of files to
 17 occur no later than the week of November 12, 2018, at which time it will provide
 18 Activision with available dates for Mr. Gard's deposition.

19 DATED: November 7, 2018 MARC E. MAYER
 20 MITCHELL SILBERBERG & KNUPP LLP

21 By: /s/ Marc E. Mayer
 22 Marc E. Mayer
 23 Attorneys for Defendants

24 DATED: November 7, 2018 VENABLE LLP

25 By: /s/ Ellyn S. Garofalo
 26 Ellyn S. Garofalo
 27 Attorneys for Third Party
 28 Global Icons LLC

Attestation Regarding Signatures

I, Marc E. Mayer, attest that all signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

DATED: November 7, 2018

/s/ Marc E. Mayer
Marc E. Mayer